

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35210

STATE OF IDAHO,)	2009 Unpublished Opinion No. 417
)	
Plaintiff-Respondent,)	Filed: April 8, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
MICHELLE BOTT-GRAHAM,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Order denying I.C.R. 35 motion for reduction of sentences, affirmed.

Keith Roark, Hailey, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Michelle Bott-Graham appeals from the district court's denial of her I.C.R. 35 motion. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Bott-Graham was an unlicensed therapist who worked with disabled children. Bott-Graham worked one-on-one with the victim in this case, a two-year-old boy who suffered from autism. Sometime while in Bott-Graham's care and custody, the victim suffered substantial injuries that led to severe cerebral hemorrhaging. The record is unclear as to exactly how the victim's injuries were sustained.

What is clear is that Bott-Graham returned the sleeping child to his daycare facility without informing the workers there about the significance of the victim's injuries. After Bott-Graham left the daycare, the victim began vomiting and having seizures. Despite medical attention, the victim later died from the injuries he received.

Bott-Graham was originally charged with first degree murder. After plea negotiations, Bott-Graham entered guilty pleas to both involuntary manslaughter, I.C. § 18-4006(2), and felony injury to child, I.C. § 18-1501(1). In February 2007, Bott-Graham was sentenced to a determinate term of ten years for involuntary manslaughter and a consecutive unified term of ten years, with a minimum period of confinement of one year, for felony injury to child.

On June 13, 2007, Bott-Graham filed her Rule 35 motion and requested a prisoner review report. That report was obtained and a hearing on the Rule 35 motion was held on March 3, 2008. At the hearing on the Rule 35 motion, Bott-Graham argued that her sentences were excessive. The district court allowed statements from the victim's parents concerning a reduction in Bott-Graham's sentences. Ultimately, the district court denied Bott-Graham's Rule 35 motion. Bott-Graham appeals.

II.

ANALYSIS

A. Double Jeopardy

Bott-Graham argues that the district court violated the Double Jeopardy Clause of the United States Constitution because the district court ordered she serve consecutive sentences for involuntary manslaughter and injury to a child. Specifically, Bott-Graham argues that her sentences violate double jeopardy because she is being punished twice for the same conduct.

It is unclear whether Bott-Graham is attempting to appeal from her judgment of conviction or whether she is simply arguing her sentences are illegal. If Bott-Graham is attempting to challenge her judgment of conviction, her appeal is untimely. *See* I.A.R. 14(a) (providing that an appeal must be filed within forty-two days from the date evidenced by the filing stamp on the judgment). If Bott-Graham is attempting to argue that her sentences are illegal, she is raising that argument for the first time on appeal. *See State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) (generally, issues not raised below may not be considered for the first time on appeal). Viewing her argument in its best light, we conclude the issue, however phrased, has been waived and decline to further address it.

B. Rule 35

Bott-Graham asserts that the district court abused its discretion by not applying the appropriate legal standards in denying her Rule 35 motion for reduction of her sentences. Specifically, Bott-Graham argues that, "not only did the court refuse to correct its error in

subjecting [Bott-Graham] to multiple punishments for the same act, the court actually asked permission from the victim's family to reduce [her] sentence." We pause briefly to address the first part of this argument. As we stated above, Bott-Graham did not argue in her Rule 35 motion or at the hearing before the district court that her sentences violated double jeopardy. Therefore, we find Bott-Graham's argument on appeal that the district court refused to "correct its error" disingenuous. Furthermore, as noted above, we decline to consider this argument in determining whether the district court abused its discretion in denying Bott-Graham's Rule 35 motion because she did not raise it before the district court.

A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1997); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984).

At the hearing on Bott-Graham's Rule 35 motion, the district court asked the victim's parents: "You folks have an objection if I make the second sentence concurrent?" After the state conferred with the victim's parents, the prosecutor responded: "Your Honor, speaking on behalf of [the victim's parents], they would object to that." The prosecutor also indicated that the parents felt Bott-Graham's sentences were adequate. The district court concluded:

Well, it was perhaps unfair for me to even ask you guys--these are, understandably, such emotional situations that even if you would have said yes or no--I don't know--I just thought I would ask, but it was unfair of me to do so.

You know, when someone has the care of a defenseless child in their custody, it just--not only our laws but our society, want that child to be treated properly and not hurt.

I think given the--given the reasons stated at sentencing, the facts of what happened, that [the victim] is dead, he is not going to have, obviously, any kind--any life at all.

....

In my opinion, in my conscience, I think that this sentence should not be reduced, so I'm going to deny your motion.

Both the Idaho Constitution and the Idaho Code provide that a victim of a crime has the right to be “heard, upon request, at all criminal justice proceedings considering” sentencing. IDAHO CONST. art. I, § 22(6); I.C. § 19-5306(1)(e). Furthermore, I.C. § 19-5306(3) provides that it applies equally to the “immediate families of homicide victims.” Although Bott-Graham acknowledges that the victim’s family had a right to be present at the Rule 35 hearing, she contends that “they had no right to make a victim impact statement at such proceeding, much less exercise a veto power over whether or not the motion was to be granted.” Bott-Graham has not supported this proposition with any citation to authority. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (holding that a party waives an issue on appeal if either authority or argument is lacking).

Furthermore, we disagree with Bott-Graham’s characterization of the events as allowing the victim’s family veto power over the district court’s actions. Although the district court certainly asked the victim’s family for their input and recognized that it was not fair to do so, it ultimately denied Bott-Graham’s Rule 35 motion because of the facts of the case, because the victim died and would live no life at all, and because the court’s conscience so directed. Bott-Graham has not established that the district court abused its discretion in denying her Rule 35 motion.

III. CONCLUSION

Bott-Graham cannot argue for the first time on appeal that her sentences violated double jeopardy. Additionally, Bott-Graham has not established that the district court abused its discretion in denying her Rule 35 motion for reduction of her sentences. Therefore, the district court’s order denying Bott-Graham’s Rule 35 motion is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**